IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 344 of 1994

For Approval and Signature:

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
HABIB@ KHEKHDO ISMAIL - Opponent(s)

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Appearance :
Mr.K.T.Dave,learned Additional Public Prosecutor for appellant.
None for the respondent.

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CORAM : HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 24/10/2007

ORAL JUDGMENT

1. This appeal under Section 378 of the Code of Criminal Procedure, 1973, has been filed by the appellant-State of Gujarat against the judgment and order dated 30-12-1993 passed by the learned Chief Judicial Magistrate, Amreli in Criminal Case No.1728 of 1992, whereby the respondent (original accused) has been acquitted for the offence punishable under Section 142 of the Bombay Police Act.

2. The case of the prosecution, in brief, is that a complaint (Exh.13) came to be filed by P.I. Jamsingh Prabhatsingh Vaghela to the effect that when he was on patrol duty alongwith Police Constable Narendra Rao, Police Constable Rajesh Hariram, Police Constable Mohanbhai Ranabhai and Police Constable Bhalashankar Jivrambhai on 24.5.1992, at about 12.45 at night, he was informed that the accused Habib @ Khekhdo Ismail, was present in his house, in contravention of the order of externment. It is stated in the complaint that the accused had been externed vide order No.35 of 1989 of the Sub-Divisional Magistrate, Amreli on 23-11-1990 from Districts Amreli, Rajkot, Bhavnagar and Junagadh for a period of two years. According to the complaint the complainant, alongwith police personnel mentioned

above went to the house of the accused, which was situated near the Temple of Sati Mata and in the presence of two panch witnesses caught the accused red handed there. They found that he had no permit to enter the Districts from which he had been externed. The panchanama was drawn in the presence of panch witnesses. The accused, having been found present in his house on 24-5-1992, was, therefore, guilty of contravention of the order of externment and of having committed the offence punishable under Section 142 of the Bombay Police Act.

3. The case was tried in the court of learned Chief Judicial Magistrate, Amreli, as a summons case. The plea of the accused was recorded and his statements were taken. The defence of the accused being total denial, the evidence in the case was recorded and the case was put to trial.

4. After appreciating the evidence on record, the trial Court came to the conclusion that the case against the accused had not been proved as no satisfactory evidence was adduced to show that the accused was guilty of the offence with which he was charged. The trial Court,therefore acquitted the

accused for the offence punishable under Section 142 of the Bombay Police Act,giving rise to the present appeal.

5. The appeal was admitted on 7-9-1994 and in the facts and circumstances, the case is being heard and finally disposed of today.

6. This Court has heard Mr.K.T. Dave, learned Additional Public Prosecutor for the appellant-State of Gujarat. Although the respondent has been served, none appears on his behalf. Mr.K.T.Dave, learned Additional Public Prosecutor submits that the judgment and order passed by the trial Court deserves to be set aside inasmuch as the learned Magistrate has erred in holding that the prosecution has failed to prove its case beyond reasonable doubt. According to him, the recitals in the complaint as well as the deposition of the complainant ought to have been believed and the finding of acquittal should not have been recorded mainly on the ground that the panch witnesses have turned hostile or that independent witnesses have not been examined. The learned Additional Public Prosecutor has, therefore, prayed that the appeal be

allowed and the impugned judgment and order of the trial Court be set aside.

7. From a perusal of the record and proceedings of the case, it is evident that the case of the prosecution rests mainly upon the complaint filed by Police Inspector Jamsingh Prabhatsingh Vaghela,who has been examined as P.W.3, at Exh.12. This witness states that on 24-5-1992 when he was on patrol duty with the police personnel he was informed that the accused, who was externed from District Amreli, had contravened the order of externment and was present in his house. He further states that on going there, the accused was found in his house and on this witness asking him whether he had a permit to enter District Amreil, it was found that the accused did not possess any such permit and therefore, P.W.3 arrested the accused for contravening the order of externment from Districts Amreli, Rajkot, Bhavnagar and Junagadh, which was imposed for a period of two years, and the complaint was filed. In the cross-examination this witness admits that it to be true that he had not taken the statements of the persons living near the house of the accused.

8. P.W.1 Dalubhai Abdul Rehman is the panch witness of the panchanama at Exh.10, regarding the presence of the accused in his house at the relevant point of time. In his testimony at Exh.9, P.W.1 has stated that he was made to sign on a prepared panchanama and has identified his signature on Exh.10. This witness has been declared hostile by the prosecution. He has totally denied that he has any knowledge that the accused was present in his house, as recorded in the panchanama at Exh.10. The testimony of this witness greatly weakens the case of the prosecution.

9. P.W.2 Jamnadas Bhagvandas, who has been examined at Exh.11 is the second witness of the panchanama at Exh.10. This witness also states that he has no knowledge regarding the contents of the panchanama and his signature has been taken on a prepared panchanama. He has denied any knowledge regarding the presence of the accused in his house and also of the contents of Exh.10. This witness has also been declared hostile by the prosecution. The panchanama regarding the presence of the accused in his house, in contravention of the order of externment,has not been proved.

10. This, in totality is the evidence brought on record by the prosecution, in support of its case.

11. Viewed in the light of the evidence, as discussed hereinabove, the panchanama at Exh.10 is the main plank on which the case of the prosecution rests. When the panch witnesses of this panchanama have denied complete knowledge about its contents and have been declared hostile, nothing remains except the complaint and testimony of P.W.3, which have not been believed by the trial Court. Although there is no bar on accepting the evidence of a police witness if it is found to be cogent and trustworthy, however, in the present case it is not safe to rely solely upon the testimony of the Police Inspector since, as per his own say, he has not examined any independent witness or the persons who live close to the house of the accused, in order to prove that the accused was illegally present there in contravention of the order of externment. There is insufficient evidence on record to prove the case of the prosecution. In my opinion, therefore, the trial Court has not committed any error in recording a finding of acquittal in favour of the accused.

12. It cannot be lost sight of, that this is an appeal against acquittal and where there is a possibility of two views, the one favourable to the accused should be adopted. It is a settled principle of law that the appellate Court would be slow to interfere in an order of acquittal until and unless the judgment of the trial Court is perverse or demonstrably unsustainable. In the present case, in the light of the evidence on record it cannot be said that the trial court has committed any error in acquitting the accused. The finding of acquittal has been rightly recorded and does not warrant interference by this court.

13. In view of the above, the appeal is dismissed.

(Smt.Abhilasha Kumari,J)

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